IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. .

A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation,
Petitioner,

v.

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1941. No. 1

A. B. Kirschbaum Company, a Pennsylvania corporation,

Petitioner,

v.

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, A. B. Kirschbaum Company, a Pennsylvania corporation, respectfully prays this Court for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, to review a final judgment of that Court entered on December 17, 1941, affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania entered on April 28, 1941.

OPINIONS BELOW.

The opinion of the District Court (R., pp. 175-180), is reported in 38 F. Supp. 204. The opinion of the Circuit Court of Appeals (R., pp. 213-23), has not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals, which Petitioner seeks to have reviewed, was filed December 17, 1941 (R., p. 213).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

THE STATUTE INVOLVED.

The statute involved, known as the Fair Labor Standards Act, (hereinafter called the "Act") approved June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Sec. 201 *et seq.*, is printed in the Appendix, *infra*, pages 25-45.

QUESTIONS PRESENTED.

The questions are:

1. Whether the Act extends to employees of an employer who is neither engaged in interstate commerce nor in the production of goods for such commerce?

2. Whether the building service employees of the owner of a loft building whose only business is the rental, operation, and maintenance of such building, are engaged in interstate commerce or in the production of goods therefor within the meaning of the Act merely because some of

the tenants in such building are engaged in the production of goods for interstate commerce?

3. Whether the elevator operators of the owner of such a loft building are directly engaged in interstate commerce?

4. Whether such building service employees are exempt from the wage and hour provisions of the Act by Section 13 (a)(2) thereof, which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce?

5. Whether the Act would contravene the Tenth Amendment to the Constitution of the United States if held to be applicable to such employees?

STATEMENT.

The Petitioner, A. B. Kirschbaum Company, owns a six-story loft building in Philadelphia (R., pp. 3, 175). Its sole activity is to operate the building as a landlord, leasing space therein to any person desiring it (R., p. 166). Although certain of its tenants are engaged in the production of goods for interstate commerce, Petitioner does no manufacturing whatsoever (R., p. 21), and has no interest in the manufacturing or other activities of any of its tenants (R., pp. 166-167, 175). In fact the Petitioner has no business or source of revenue other than that which is connected with its ownership and leasing of its building (R., p. 176).

In operating the building, it employs a staff of building service employees consisting of three elevator operators, two watchmen, three firemen, one engineer, a carpenter and a carpenter's helper, and a porter or cleaner (R., p. 175), who are the employees involved in the present case.

The Petitioner through its aforesaid employees, heats the building, keeps it in repair, furnishes steam and direct electric current to those of its tenants who desire it,

cleans those portions of the building which are not leased, and provides means of ingress and egress for its tenants, their employees and property being shipped to and by them. None of the foregoing employees produces, manufactures, handles, processes, or in any other manner works on or touches for the purpose of production any goods produced by any of the tenants. The goods transported in the elevators operated by certain of said employees are always in the custody of the representatives of the tenants, or their employees, or of employees of persons whom the tenants have engaged to transport the goods, or of the employees of carriers from whom they are receiving goods (R., pp. 37, 47, 56, 57, 83, 85, 99, 100, 109, 110, 113, 120, 121, 129, 135, 138, 149, 158, 159, 163).

The Respondent, contending that all of the foregoing building service employees of the Petitioner are covered by the Act, filed its complaint on March 14, 1940, and thereafter on April 19, 1940, filed its amended complaint (R., pp. 3-7), alleging that the Petitioner had violated the Act in that it had not paid its employees the minimum wages provided for in Section 6, and had worked them in excess of the hours provided in Section 7 without the payment of overtime as therein provided, and prayed for an injunction restraining future violations. The basis of the Respondent's contention was that since the Petitioner's employees were engaged in the servicing and maintenance of a building, space in which was rented to persons engaged in the production of goods for interstate commerce, such employees were themselves engaged in the production of goods for interstate commerce and thus covered by the Act in view of the provisions of Section (3) (j) which provides that an employee shall be deemed to have engaged in the production of goods for interstate commerce if he was employed "in any process or occupation necessary to the production thereof." In addition the Respondent asserted that the

Petitioner's elevator operators were also directly engaged in interstate commerce.

On April 26, 1940, the Petitioner filed its Answer wherein it admitted that it did not conform to the requirements of Sections 6 and 7 of the Act with respect to certain of its aforesaid employees (Answer, pars. VII, VIII, R., p. 12), but asserted *inter alia*, first, that its employees did not come within the provisions of the Act; second, that in any event they were specifically exempt under the provisions of Section 13 thereof; and third, that the Act could not constitutionally be applied to them (R., pp. 13, 14).

After trial, the District Court, in an opinion by Kirkpatrick, *J.*, filed April 2, 1941, granted judgment for the Respondent (R., pp. 175-180), which judgment was entered on April 28, 1941 (R., pp. 180-182).

On the same day the Petitioner filed its notice of appeal to the Circuit Court of Appeals for the Third Circuit, together with bond for costs sur appeal. At the same time the District Court, on motion of the Petitioner, entered its order suspending the injunction pending appeal (R., p. 185).

After argument on appeal, the Circuit Court, in an opinion filed December 17, 1941, affirmed the judgment of the District Court (R., pp. 213-23).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Third Circuit erred—

(1) In holding that the Act covers employees of an employer who is neither engaged in interstate commerce nor in the production of goods for such commerce.

(2) In holding that the building service employees of the Petitioner are engaged in the production of goods for interstate commerce within the meaning of the Act.

(3) In holding that the elevator operators in the loft building of the Petitioner are directly engaged in interstate commerce.

(4) In holding that the building service employees of the Petitioner are not exempt from the wage and hour provisions of the Act by Section 13 (a)(2) which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce.

(5) In holding that the Act, when applied to the building service employees of the Petitioner, does not violate the Tenth Amendment to the Constitution of the United States.

(6) In holding that the building service employees of the Petitioner are covered by the Act and in affirming the judgment of the District Court enjoining the Petitioner from violations of the Act.

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant the writ requested is invoked because the Circuit Court of Appeals for the Third Circuit:

I. Has decided important questions of federal law which have not been, but should be, settled by this Court.

II. Has, in its interpretation of important provisions of the Act, gone beyond the decision of the Circuit Court of Appeals for the Second Circuit in a case involving similar facts.[1]

III. Has decided important questions of federal law in conflict with applicable decisions of state and lower federal courts.

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[1] *Philip B. Fleming* v. *Arsenal Building Corporation, et al.*, decided By the United States Circuit Court of Appeals for the Second Circuit on December 30, 1941, not yet reported. The decision however is printed in full in the Appendix to this Petition, pp. 46-53, *infra*.

I.

The case of *Fleming v. Arsenal Building Corporation, et al, supra,* decided by the Circuit Court of Appeals for the Second Circuit, involved (on facts substantially the same as those herein), the same legal questions as are involved in the present case and that Court likewise entered judgment sustaining the Act as applicable. However, after referring to the wide conflict of opinion among *appellate* courts by stating that "So far the score is four to one against the view we take," the Second Circuit in the concluding sentence of its opinion stated: "Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling."

That the existing uncertainty with respect to an important and far reaching Act of Congress should be set at rest is not only desirable but essential to the proper administration of the Act and as a guide to those seeking to comply with its provisions.

The only decision of this Court involving the general coverage of the Act is that of *United States* v. *F. W. Darby Lumber Company,* 312 U. S. 100, 85 L. Ed. p. 609 (1941). In that case this Court held the Act constitutional when applied to an employer, engaged in the manufacture and shipment of goods in interstate commerce, with respect to those of his employees who work on or produce the goods which he so ships or expects to ship across state lines. This Court did not attempt to define the precise limits of what particular acts constitute "production for commerce," nor did it of course pass upon those additional questions raised in the present case which were not involved in the *Darby* case as, for example:

(*a*) Whether the Act applies to employees of an employer, such as the Petitioner, who is neither engaged in interstate commerce nor in the production of goods therefor;

(*b*) Whether the phrase "any process or occupation necessary to the production" of goods as used in

"Section 3 (j) of the Act (which section defines the word "produced"), covers activities, such as those of the Petitioner's building service employees, which do not function in the production of goods for commerce, and if so, whether the Act is constitutional;

(c) What constitutes a "service establishment" as that phrase is used in Section 13 (a)(2) of the Act which provides that "The provisions of Sections 6 and 7 shall not apply with respect to * * * any employee engaged in any * * * service establishment the greater part of whose * * * servicing is in intrastate commerce * * *"; and

(d) Whether elevator operators in a loft building space in which is leased to tenants engaged in the production of goods for interstate commerce, are directly engaged in interstate commerce.

With respect to those questions, all of which are raised in the present case, the courts are either uncertain or are in conflict. Thus an authoritative ruling by this Court on those questions is necessary to resolve the conflict and dispel the uncertainty.

II.

Although the Circuit Court in the present case held the Act applicable to building service employees employed by the owner of a loft building, space in which was leased to tenants engaged in producing goods for interstate commerce (thus reaching a conclusion in accord with that subsequently reached by the Second Circuit),[1] in several matters it went further than the Second Cirucit.[2]

Thus, whereas the Third Circuit held that the Petitioner's elevator operators "are also directly engaged in

[1] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, pp. 46-53, *infra*.

[2] In *Fleming* v. *Arsenal Building Corporation, et al., supra*, the Court stated: "On the other hand the Third Circuit in *Fleming* v. *Kirschbaum Company*, 123 Fed. 2d, , agrees with us and indeed in one or two matters went further than we have found it necessary as yet to go" (Appendix, p. 53, *infra*).

commerce,"[3] the Second Circuit stated that it did not find it necessary to decide that question.[4]

Furthermore, whereas the Third Circuit held that an "occupation *necessary* to the production" of goods within the meaning of Section 3(j) of the Act was one not indispensable but merely convenient and appropriate,[5] the Second Circuit, recognizing the constitutional and other difficulties which would ensue if such an interpretation be carried to its logical conclusion, sidestepped the issue by reasoning that if the service employees had been employed by each of the manufacturer-tenants rather than by the landlord, there would have been no question but that their services were "necessary" to the production of goods within the meaning of the Act, consequently they must come within the Act even though their services are rendered to an employer who is not a manufacturer but merely a landlord.[6]

In addition, whereas the Third Circuit held that an employer leasing space to manufacturers engaged in the production of goods for interstate commerce, did not operate a "service establishment" within the meaning of the exemption contained in Section 13 (a)(2) of the Act,[7] the Second Circuit after reluctantly stating that "*Possibly* it is not a 'service establishment' at all,"[8] failed to pass upon the question and held that even if such an employer were a "service establishment," its servicing would not be in intrastate commerce.

The Second Circuit noted in its opinion that the Third Circuit "indeed in one or two matters went further than we have found it necessary as yet to go." Whatever satisfaction that may have afforded the Second Circuit,

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[3] *Fleming* v. *A. B. Kirschbaum Company* (R., p. 219, footnote).

[4] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, p. 48, *infra*.

[5] *Fleming* v. *A. B. Kirschbaum Company* (R., pp. 219-220). Italics supplied.

[6] See *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, pp. 48-50, *infra*.

[7] *Fleming* v. *A. B. Kirschbaum Company* (R., pp. 220-222).

[8] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, p. 50, *infra*. Italics supplied.

the two decisions, read together, left important questions raised by the litigation in much the same state of uncertainty and confusion as before and furnished little comfort to those seeking to learn what the Act means and how to comply with its provisions. Obviously the nature of activities which constitute "commerce" or "the production of goods for commerce" within the meaning of the Act, and the characteristics of an establishment requisite to constitute it a "service establishment" within the meaning of the Act, are important questions of federal law requiring an authoritative and final determination.

III.

In addition to the decisions of the Second and Third Circuits discussed above, the applicability of the Act to building service employees employed by a landlord who rents space to tenants engaged in interstate commerce or in the production of goods therefor, has been presented before different federal and state courts in four other cases, *all* of which have held contrary to the two above Circuits that the Act does not cover such employees. Thus, on the specific question raised in the present case—*viz.*, the application of the Act to building service employees—the score is four to two against the view of the Third Circuit in the present case.

On the broader question—*viz.*, the applicability of the Act to employees of an employer who is neither engaged in interstate commerce nor in the production of goods therefor—the conflict is even greater, the majority of the cases in which the question has been specifically raised holding that the Act does not cover such employees.

The existence of such a conflict of opinion is in itself sufficient to warrant this Court to review the decision in the present case. But the need for an authoritative decision is even greater because of the jurisdiction given by

the Act itself to state courts over suits by employees to recover the compensation provided for in the Act.[1]

Typical of the view of the majority of the decisions, that the Act does not apply to building service employees of a landlord not engaged in interstate activity, is the decision of the United States District Court for the District of New Hampshire in the case of *Merryfield, et al.*, v. *F. M. Hoyt Shoe Corporation, et al.*, 41 F. Supp. 794 (Nov. 6, 1941). In that case suit was brought by building service employees against the Shoe Corporation and the Reconstruction Finance Corporation as the owners of a loft building in which they had been employed, to recover the compensation to which they claimed they were entitled under the Act. The Shoe Corporation had, like the Petitioner herein, formerly been engaged in manufacturing. In 1936 it ceased its manufacturing. Thereafter it rented its factory buildings to other companies, in no way connected with the Shoe Corporation, which engaged in the production of goods for interstate commerce. As owner of the factory buildings it employed the plaintiffs as building service employees. The R.F.C. foreclosed the mortgage which it held and thereafter continued to rent and operate the premises as theretofore.

In dismissing the action, the Court made clear that the interstate activity of the tenants could not bring the employees of the landlord under the scope of the Act. In his opinion Judge Morris stated (pp. 795, 796):

> "The R.F.C. never engaged in the manufacture of any product for interstate shipment. It was merely

[1] See Section 16 (b) of the Act, printed in the Appendix to this Petition, p. 44, *infra*, which provides as follows: "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

> the owner and lessor of real estate which was occupied by lessees who were engaged in the manufacture of goods for interstate shipment. The plaintiffs had nothing to do with the actual manufacture of goods but were in the employ of the owners of the real estate, first the Hoyt Shoe Corporation and, second, the R.F.C. They are set out in the complaint as firemen, watchmen and maintenance men to look after the real estate, paid by the Shoe Corporation and later by the R.F.C. * * *
>
> "I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act."

A similar conclusion was reached by the Supreme Court of New York, Appellate Division, in *Killingbeck & Riddoch v. Garment Center Capital, Inc.*, 20 N. Y. Supp. (2d) 521, 259 App. Div. 691 (1940). In that case suit was brought by a watchman and a carpenter formerly employed by the defendant, the operator of a loft building, space in which was leased to tenants engaged in the production of goods for interstate commerce, to recover overtime payments and liquidated damages to which they claimed to be entitled under the Act by reason of the fact that as employees of such building they were performing services necessary to the production by the tenants of goods for interstate commerce. The facts with reference to the activities of the employees in question, the nature of the business conducted by the defendant as well as that conducted by the tenants, and the relation of the employees to the tenants, are substantially the same as those involved in the present case. The Court directed that judgment be rendered for the defendant and in its opinion by Judge Untermyer stated:

"We think the statute does not include such employees *when they are not employees of a manufacturer who is engaged in interstate commerce.* Concededly the statute would include those employees of a manufacturer who produced the goods. * * * *We would encounter insuperable difficulties however, and would distort the statute if we should apply it to employees of others than the manufacturer, having so remote and indirect a relation to the production of the goods as the watchman and the carpenter employed by a landlord a portion of whose premises have, perhaps fortuitously, been rented to tenants engaged in interstate commerce* * * * Such employees are not engaged 'in any process or occupation necessary to the production' of goods destined for interstate commerce but in an occupation which may, perhaps, be necessary in the operation of a building wherein the goods are produced." (Italics supplied.)

To the same effect is the decision of the Court of Appeals for the First Appellate District of Ohio in the case of *Cecil, et al.*, v. *Gradison, et al.*, November 17, 1941.[2] In that case the defendants owned a building in part of which they conducted a banking business. The plaintiffs, one of whom was employed by the defendants to serve as janitor and the other as engineer, and both of whom served as freight and passenger elevator operators, sought to recover from the defendants the overtime compensation to which they claimed they were entitled under the Act. It was alleged by the plaintiffs, and admitted for the purposes of the suit, that they handled shipments of various kinds and descriptions to persons and corporations in other states, which activities were alleged to be in furtherance of the defendants' business and that other-

[2] So far as we have been able to determine the decision has not as yet been officially reported. However a complete copy of the opinion is printed in the Appendix to this Petition, pp. 53-58, *infra*, and it also appears in 4 W. & H. Rep. 698.

wise the packages could not have been transported on the elevators or have passed from the control of the respective tenants to the persons to whom they were directed.

The Court, in affirming the action of the lower court in sustaining a demurrer to the petition, stated:

> "A reading of the declaration of policy contained in Section 202 and the definition of terms makes it clear that Congress meant to protect the interstate transaction from sub-standard labor conditions by regulating such conditions in the interstate transaction and those transactions that directly and substantially affect the interstate transaction. Beyond that, Congress could not go.
>
> "Accordingly, the language of Section 206, 29 U. S. C. A., that 'Every employer shall pay to each of his employees *engaged in* commerce or in the production of goods for *commerce* wages at the following rates' and the provision in Section 207 that 'No employer shall—employ any of his employees who is engaged in commerce or in the production of goods for commerce,' must be limited by the declared purpose in Section 202 and the definition of terms in Section 203, in order to confine the act within the constitutional power of Congress.
>
> "And when so read and limited it is clear that the Act does not apply to employees of intrastate employers engaged to and actually performing intrastate acts, notwithstanding such intrastate acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

The Supreme Court of Tennessee accords with the view of the majority of the decisions. In *Robinson* v. *Massachusetts Mutual Life Insurance Company,* decided by that

Court on November 29, 1941,[3] suit was brought by building service employees against the defendant who was the owner and operator of three office buildings, ninety percent of the space in which was leased to the Tennessee Valley Authority, to recover compensation alleged to be due them under the Act. In affirming the judgment of the lower court in favor of the defendant, the Supreme Court stated:

> "We are of opinion that plaintiff in error and those in whose behalf he sues are not engaged in interstate commerce or in the production of goods for commerce. We are wholly unable to relate the work in which plaintiff in error is engaged to the actual movement or flow of goods in interstate commerce. As we interpret the Act, it is limited to those employees who contribute directly to the production of goods for interstate commerce." • • •
>
> "Plaintiff in error and those for whom he sues are one step removed from the class of employees embraced in the Act. In a sense every individual whose activity in any way touches or affects the lives of those engaged in producing goods for interstate commerce contribute to such production, but we think Congress intended to limit the Act to those who directly contribute to the production of the goods." • • •
>
> "A contrary view to that expressed in the two foregoing cases [Fleming *v.* Arsenal Building Corporation, 38 F. Supp. 207 and Killingbeck, *et al. v.* Garment Center Capital, Inc., 20 N. Y. Supp. (2d) 521], was declared by Judge Kirkpatrick in Fleming *v.* A. B. Kirschbaum Co., 38 F. Supp. 204, but the decision in that case, if carried to its logical conclusion

[3] So far as we have been able to determine the decision has not as yet been officially reported. However a complete copy of the opinion is printed in the Appendix to this Petition, pp. 58-65, *infra*, and it also appears in 4 W. & H. Rep. 725.

would embrace every employee who in the remotest degree contributed to those who produced goods for interstate transportation, which, as heretofore stated, was not, in our opinion, the purpose of Congress."

Thus, of the six cases which have been decided involving the applicability of the Act to building service employees employed by the owner of a building leased to tenants, certain of whom were engaged in commerce or in the production of goods therefor, four hold the Act inapplicable. Of these four, three[4] proceed on the principle that the Act is not applicable to employees of an employer who himself is neither engaged in interstate commerce nor in the production of goods therefor, while the other[5] proceeds on the theory that such employees are not engaged in the production of goods for interstate commerce since their services do not directly contribute to such production.

With respect to the broader question as to whether the Act covers the employees of an employer who is neither engaged in interstate commerce nor in the production of goods therefor a more pronounced conflict exists.

In addition to the three cases above cited holding the Act inapplicable to the employees of an intrastate employer may be added the following: *Pederson* v. *J. F. Fitzgerald Construction Company*, 262 App. Div. 665, 4 W. & H. Rep. 661 (N. Y. Sup. Ct., Appellate Division, 3rd Dept. Nov. 12, 1941); *Gerdert* v. *Certified Poultry and Egg Company*, 38 F. Supp. 964 (D. C. S. D., Fla., April 29, 1941); *Farr* v. *Smith Detective Agency and Night Watch Service, Inc.*, 38 F. Supp. 105, 4 W. & H. Rep. 230 (D. C. N. D., Tex., April 14, 1941); and *Baggett* v. *Henry Fischer Packing Company*, 37 F. Supp. 670, 4 W. & H. Rep. 133 (D. C. W. D., Ky., Feb. 24, 1941).

[4] *Merryfield et al.* v. *F. M. Hoyt Shoe Corporation, et al., supra; Killingbeck & Riddoch* v. *Garment Center Capital, Inc., supra*, and *Cecil, et al.* v. *Gradison, et al., supra.*

[5] *Robinson* v. *Massachusetts Mutual Life Insurance Company, supra.*

Court decisions can of course be found containing dicta to the effect that the test of coverage is dependent solely upon the activities of the individual employee regardless of the nature of the businss in which the employer is engaged. However, those cases for the most part are of the type where it is apparent that the employer was engaged either in interstate commerce or in the production of goods therefor and thus the only question before the Court was whether the activities of the employees in question were of the requisite type to bring them within the Act.[6]

There are however decisions, in addition to the decision of the Third Circuit in the present case and that of the Second Circuit in *Fleming* v. *Arsenal Building Corporation, et al., supra,* holding that the test of coverage is dependent solely upon the activities of the individual employee regardless of the character of the employer's business. Representative of those cases is *Hall* v. *Warren Bradshaw Drilling Co.*, 40 F. Supp. 272 (N. D., Tex., July 18, 1941). But so far as we have been able to determine, cases directly so holding are in the minority; and it is significant that the courts which so hold have either misconstrued or completely ignored the legislative history of the Act. What could be clearer than the statement which Senator Claude Pepper, a member of the Senate Conference Committee which reported the bill which subsequently became the Act, made on the floor of the Senate at the time of the discussions of that bill preceding its passage.[7]

> "Mr. Pepper. If the Senator will allow me once more, I will not interrupt him further. On the contrary, the conference report provides that resort may be had to the circuit court of appeals by any petitioner who alleges that he is unlawfully affected by

[6] To this class of cases belongs *Sunshine Mining Co.* v. *Carver*, 34 F. Supp. 274 (D. C. Idaho, July, 1940).

[7] 83 Cong. Rec., p. 9168.

this bill, and *if he may be able to show that he is not engaged in commerce or is not engaged in the production of goods for interstate commerce it will be the duty of the court to exempt him from the application of the law.*" (Italics supplied.)

Not only in the Senate but in the House as well authoritative discussion seems clearly to support the view that the test of coverage depends not only upon the activities of the individual employee, but also upon the interstate character of the employer's business. Thus, Representative Schneider, a member of the Committee on Labor of the House (to whom Representative Welsh, a member of the Conference Committee and one of the managers of the bill in the House, yielded), in discussing the scope of the bill, stated:[8]

> "The measure as reported out by the conference report *applies to interstate business exclusively.* This is, of course, very well known. It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape or form affect intrastate or purely local or State business. *It covers only interstate commerce; that is business which is interstate in character.*" (Italics supplied.)

But the conflict in the decisions does not end here. As previously noted the Third Circuit in the present case held that elevator operators in a loft building, space in which was rented to tenants engaged in the production of goods for interstate commerce, "are also directly engaged in commerce."[9] The Second Circuit stated that it did not find it necessary to decide that question.[10]

On the other hand the Court of Appeals for the First Appellate District of Ohio in the case of *Cecil, et al.*, v.

[8] 83 Cong. Rec., p. 9260.

[9] *Fleming* v. *A. B. Kirschbaum Company* (R., p. 219, footnote).

[10] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, p. 48, *infra*.

Gradison, et al., found to the contrary.[11] In its opinion it stated:

> "In *State, ex rel Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21, the Court held that cab service maintained by the interstate railroad company to carry passengers to and from its terminus in New York—for which a separate charge was made—was not interstate commerce. At page 28 the Court said:
>
> 'If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is it not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?
>
> 'We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, * * *.'
>
> See also: Minn. *v.* Blasius, 290 U. S. 1.
>
> Therefore, where these plaintiffs, as employees of the defendants, handled articles for defendants and their tenants, they were performing intrastate acts preceding and following interstate transactions, and were not engaged in interstate commerce."

It is noteworthy that in the present case (as contrasted with the facts in the above opinion), the elevator operators do not in any sense handle the goods which remain at all times in the custody of representatives of the tenants or transportation agencies. Furthermore, Judge Woolsey, in *Fleming v. Arsenal Building Corporation, et al.*, 38 F. Supp. 207 (April 11, 1941), made the cryptic observation that elevator operators, "if considered as engaged in any

[11] See footnote 2, p. 13 of this Petition; also Appendix to this Petition, pp. 56-57, *infra*.

commerce, . . . were engaged in a vertical intrastate commerce and could not have been considered to have been engaged in interstate commerce in any proper sense."

As a result of this difference of opinion, elevator operators within the Third Circuit engaged in the operation of elevators in loft buildings space in which is leased to interstate tenants, can recover in the federal courts within that Circuit from their landlord employers the compensation provided for in the Act, whereas if they instituted suit in the state courts of Ohio, New York or Tennessee or in the Federal District Court of New Hampshire, they could not recover. If this be justice, elevator operators should make the most of it.

As if to add chaos to the already existing confusion, there is also wide divergence among the courts as to what activities constitute "production of goods for commerce" within the meaning of Section 3 (j) of the Act which provides as follows:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics supplied.)

The Second Circuit, conceding generally speaking the soundness of the argument that Congress could not have meant to impose labor standards upon every one who might chance to contribute any necessary service to the production of goods "produced for commerce," nevertheless was unwilling, as it said, to be drawn into "dialectical niceties" and contented itself with the pronouncement that the activities of the building service employees of the Arsenal Building Corporation were "necessary"

to the production of goods for commerce by the tenants in that building because, had they been employed by such tenants, their services would have been necessary to such production.[12]

The Third Circuit in the present case recognized no such difficulties or dialectical niceties. Apparently the Court, not impressed by what sometimes has been regarded as a limitation imposed upon Congress by the Constitution, construed the word "necessary" as used in the Act to be synonymous with "convenient and appropriate"; found that the services of the watchmen, carpenters and porters, although not indispensable, were "both convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce"; and thus concluded that, since the services of such employees were convenient and appropriate to the *maintenance of a loft building*, they must as a consequence be "necessary" to the *production activities of the tenants*.[13]

Courts of less temerity have taken issue with this view. In *Merryfield, et al.*, v. *F. M. Hoyt Shoe Corporation*, 41 F. Supp. 794, 795, 796 (Nov. 6, 1941), Judge Morris stated:

> "The plaintiffs [*i. e.* firemen, watchmen and maintenance men] had nothing to do with the actual manufacture of goods but were in the employ of the owners of the real estate . . .
>
> . . . . . .
>
> "I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act."

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[12] *Fleming* v. *Arsenal Building Corporation, et al.*; Appendix, pp. 48-50, *infra*.

[13] *Fleming* v. *A. B. Kirschbaum Company*, (R., pp. 219, 220).

Furthermore, in *Robinson* v. *Massachusetts Mutual Life Insurance Company*,[14] the Supreme Court of Tennessee stated:

> "As we interpret the Act, it is limited to those employees who contribute directly to the production of goods for interstate commerce. * * * In a sense every individual whose activity in any way touches or affects the lives of those producing goods for interstate commerce contribute to such production, but we think that Congress intended to limit the Act to those who directly contribute to the production of the goods."

And in *Cecil, et al.* v. *Gradison, et al.*, decided by the Court of Appeals for the First Appellate District of Ohio,[15] the Court said:

> "* * * the Act does not apply to employees of intrastate employers engaged to and actually performing intrastate acts, notwithstanding such intrastate acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

To the same effect is *Jewel Tea Company* v. *Williams*, 118 F. (2d) 202, 206 (C. C. A., 10th Cir., Mar. 6, 1941), where the Court stated:

> "The Act by its terms is limited to employees engaged in interstate commerce or in the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce. If there could be doubt as to the correctness of this interpretation, it is set at rest by the legislative history of the Act."[16]

Without wishing to be accused of engaging in "dialectical niceties," we venture to suggest that if the words "neces-

[14] See footnote 3, p. 15 of this Petition; also Appendix, pp. 61-62, *infra*.
[15] See footnote 2, p. 13 of this Petition; also Appendix, p. 58, *infra*.
[16] See also *Fleming* v. *Arsenal Building Corporation, et al.*, 38 F. Supp. 207

sary to production" are given the meaning attributed to them by the Third Circuit, there is no limit to which the coverage of the Act could not be carried. Thus, if the activities of the Petitioner's engineer, janitor or watchman are "necessary" to the production of goods by the Petitioner's tenants and thus constitute in themselves "production of goods for commerce," it could be asserted with equal logic that the employees of the concern which manufactures the elevators, boilers and generators used in the Petitioner's building, or the employees of the contractor who constructed the building, would be subject to the Act (assuming they were not otherwise covered), because their production of such equipment, or their construction of the building, was necessary to the production of goods for commerce by Petitioner's tenants.

Without engaging at this time in a discussion of the constitutional problems raised by the decision of the Third Circuit, it is sufficient to point out that such a holding not only involves a further extension of Congressional power over intrastate commerce, but constitutes an inroad upon local conditions and standards of such far reaching importance as to disturb the balance of a proper distribution of power between the state and national governments.

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this petition for a writ of certiorari should be granted.

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JANUARY 28, 1942.

APPENDIX.

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying

that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division ~~which shall be under~~ the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In

the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representatives may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reason-

able per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in deter-

mining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible

without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such

classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after

such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be con-

clusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provisions of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12 (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under sec-

tion 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propogating, processing, marketing, freezing, canning, curing, storing or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions

contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental de-

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

ficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section

or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not

Approved, June 25, 1938.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 87—October Term, 1941.

(Argued November 5, 1941 Decided December 30, 1941.)

PHILIP B. FLEMING,

Appellant,

—*v.*—

ARSENAL BUILDING CORPORATION *et al.*,

Appellees.

Appeal from a judgment of the District Court for the Southern District of New York, dismissing a complaint in an action to compel compliance with §7(a) of the "Fair Labor Standards Act of 1938."

Before:

L. HAND, CLARK and FRANK,

Circuit Judges.

IRVING J. LEVY for the appellant.

WALTER GORDON MERRITT for the appellees.

L. HAND, *C. J.*:

The plaintiff appeals from a judgment, dismissing after trial his complaint against the defendants—filed under §17 of the "Fair Labor Standards Act of 1938"—to restrain violation of §15(a)(2) of that act. The only question is whether §7(a) requires the defendants to pay "time and a half" to their employees. (We may ignore the defendant, Spear & Co., Inc., for any decision as to it must concededly follow that as to the Arsenal Building Corporation, of which we shall speak as the defendant.) The facts are as

follows. The defendant owns a twenty-two story loft building in New York City, of which it lets out substantially all the space to manufacturers of women's clothes, who are concededly engaged in interstate commerce: i.e., they import part of their raw materials into the state and send out of the state a large part of the completed clothes. (With the exception of three of these manufacturers, the sales of two of whom were very small, the percentage of interstate shipments was in every case more than two-thirds; the percentage of the total shipments was 82.) All but two occupy less than a single story of the building; one occupies one and a half stories, and the other, five and a half. The defendant has no other business but leasing the space, collecting the rent and such services as are incidentally necessary: e.g., protecting the tenants' property, keeping the building itself clean, warm, lighted and in repair, furnishing steam and hot water, and manning and running the elevators. To render these services it employs 25 workmen of various sorts (besides a superintendent, concededly not within the act) and it has refused to pay them "time and a half" for overtime as defined by §7(a)(1) and §7(a)(2) of the act. The plaintiff's position is that, although these employees do not have any part in the actual handling of materials or of the finished goods (except insofar as running the elevators may be such) they are nevertheless "engaged in commerce" and "in the production of goods for commerce" within §7(a). The defendant denies this, and further asserts that it is in any case exempted by §13(a)(2) because the employees are engaged in a "service establishment the greater part of whose * * * servicing is in intrastate commerce." Finally it says that the act does not cover the employees of employers who are not themselves "engaged in commerce or in the production of goods for commerce." The district judge held that the employees were not "engaged in the production of goods for commerce," or "in commerce"; and that the defendant was a "service establishment" all of whose activity was intrastate.

We think that the employees here in question are "engaged * * * in the production of goods for commerce" within §7(a), and for that reason we do not find it necessary to decide whether they are also "engaged in commerce." First, are they engaged in the production of goods at all? Section 3(j) defines that phrase as meaning, "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." Whatever may be thought of the applicability of this definition down to the last clause, we are satisfied that the "occupation" of these men was "necessary to the production" of the clothes. If instead of leasing space in the defendant's building, the manufacturers had each owned and occupied a whole factory of his own, this conclusion seems to us scarcely debatable. Cutters and stitchers cannot work in a cold or filthy building; they must have light and power to drive their machines; they cannot be required to carry goods from one story to another. Those who make and keep the factory fit for them in these ways are as "necessary" to "production" as they are themselves.# Yet it would as much defeat the purpose of the act, as expressed in §2, to deprive such workmen of its protection when they chance to be employed by a different employer, as when they are employed by the employer of the cutters and stitchers. And a competing dressmaker may find his rival's lower rent as "unfair" a differential against him in the cost of production, as lower wages; he will indeed feel it less directly, but it may still be felt. We may therefore start with the assumption that Congress did not mean to draw any line, based merely upon

Bowie v. *Gonzalez*, 117 Fed. (2d) 11, 20 (C. A. A. 1); *S. H. Robinson & Co.* v. *LaRue*, Sup. Ct. Tenn. Nov. 29, 1941; *Wood* v. *Central S. & G. Co.*, 33 Fed. Suppl. 40; *Lefevers* v. *General Export I. & M. Co.*, 36 Fed. Suppl. 838; *Muldowney* v. *Seaberg Elevator Co.*, 39 Fed. Suppl. 275; *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 Fed. Suppl. 300. *Rogers* v. *Glazer*, 32 Fed. Suppl. 990; and *Goldberg* v. *Worman*, 37 Fed. Suppl. 778 concerned "retail establishments" and are not to the contrary.

the division of the same duties among several employers, unless the language of the act very plainly requires us to believe that it did. We can find none that compels us so to believe; on the contrary §3(i) which includes "parts and ingredients" of "goods" with the goods themselves, confirms our understanding. The history of the clause affords further confirmation; it originally read: "or in the making of tools or dies used in the production of such goods in any State." That obviously implied that the later use of the tools and dies—otherwise outside the act—might characterize them enough from the outset to put within it those who made them. The final form of words chosen was far more general, it is true, but there is no indication of any change in the original intent in this regard.

To this the defendant answers that it proves too much, for Congress could not have meant to impose "fair labor standards" upon everyone who might chance to contribute any necessary "ingredient," or service to the production of goods "produced for commerce." The miller who furnishes the flour to a baker who sells bread in other states could not have been intended; or the cutler who sells knives to a wholesale butcher; or the service station which repairs and fills a manufacturer's trucks; or the chemist who supplies alcohol to a perfumer. Stated so generally, the argument may be sound; at any rate we will assume arguendo that the purveyor of "ingredients" or services to all-comers at random will not find himself within the act merely because some part of what he sells eventually finds its way into "goods produced for commerce." Perhaps in the end it will turn upon the distribution of his customers among those who are engaged in interstate commerce and those who are not; here, as so often, the test may be one of degree. We need not answer, for here at any rate no such dilemma presents itself. As we have said, the work of the defendant's employees is in kind substantially the same as it would be if the manu-

facturers employed them directly. That is the substance of the matter. Since the words and the purpose of the act coalesce so far, we will not allow ourselves to be drawn into dialectical niceties which are not before us and whose answer need not compromise the step we are taking.

Nor do we think that the defendant is a "service establishment the larger part of whose * * * servicing is in intrastate commerce"; §13(a)(2). Possibly it is not a "service establishment" at all; perhaps that phrase should be limited to those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and "servicing" does indeed suggest as much. But it is enough for our purpose that, if it is a "service establishment," at least its exemption must depend upon the extent to which its servicing is intrastate. Suppose for example, that these manufacturers, instead of pressing the clothes themselves, sent them out to other shops which pressed only for them; the fact that the pressing took place in the same state as the cutting and stitching would not, we think, exempt the pressers; their servicing would be "in interstate commerce." The "servicing" being a part of "production," the test should be what kind of production it is a part of. The question is really the same as that we have just considered: i. e., whether it is important how that production is divided among employers. It cannot be that if the exemption extends beyond retail "servicing," it is the character of the "servicing" itself that counts, divorced from the "production" of which it is a part. Again, we should be met by the anomaly arising from such an interpretation—the capricious incidence of the act resulting from the accident of the industrial division of the whole process.

The defendant's last argument is based upon §§5 and 8, which prove, it says, that the act covers only the employees of employers who are themselves "engaged in" interstate

commerce. Acknowledging, as it must, that §6 commands "every employer" without limitation to "pay to each of his employees" the standard wage, and that §7 declares that "no employer" shall "employ any of his employees" for more than the prescribed hours, the defendant rests its argument upon the constitution and functions of the "industry committees." Since these must be composed only of employers "engaged in" interstate commerce, and since they have power to fix the rate of wages, the argument is that the act cannot apply to employers who are not represented upon them. We do not agree. Section 5(a) does not confine the "Administrator" to committees for "each industry engaged in commerce"; he may also appoint them for industries "engaged * * * in the production of goods for commerce." One third of its membership must, it is true, "represent employers in the industry"; and §8 gives power to the committees to fix the wage in the "industry" (not over 40 cents an hour) and to report to the "Administrator," who is to approve the report "if he finds that the recommendations are made in accordance with law, are supported by the evidence * * * and * * * will carry out the purposes of this section"; otherwise he is to refer back the question to the same or another committee. (Subd. d.) Section 3(h) defines an "industry" as including not only a "branch" of an industry, but "a group of industries."

It is certainly undesirable, and it is probably impossible, to define with accuracy just what are the limits imposed upon the "Administrator's" choice by §5, but if we read subdivisions a and b together and interpolate in their proper places the definitions of §3(h) and §3(j), we get substantially the following. The "Administrator" is directed to appoint a number of persons "representing employers" for each "group of industries" whose employees are "employed * * * in any process or occupation necessary to the production" of "goods for commerce." Certainly this grants him the power if he thinks best to

put upon one committee an employer "engaged • • • in the production of goods for commerce," like the defendant, with employers "engaged in interstate commerce," like the tenants. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 149, 150. The history of §§6 and 7 in Congress leaves no doubt that this is the right view. In the Senate the sections read in substance as they now do, though the wording was somewhat different (Senate Bill 2475 passed July 31, 1937). The House amended them to limit them to employers engaged in commerce or in industry affecting commerce (taking the view now urged by the defendant) and to include all the employees of such employers. The conference report particularly dealt with this difference (House Report 2738, 75th Congress 3rd Session pp. 29 and 30) and declared that the only test should be the occupation of the employees; Senator Pepper, one of the managers in the Senate, expressly stated on the floor that this was its meaning.

As has already appeared from the decisions cited, the question now at bar has come up a number of times when the ancillary service was performed by employees of the same employer who was himself "engaged in commerce"; and the result has been fairly uniform. We have found five decisions of appellate courts which have dealt with employees of an employer, who was not "engaged in commerce," or whom at least the courts treated as not so "engaged." So far the score is four to one against the view we take. In *Killingbeck* v. *Garment Center Capitol Inc.*, 259 App. Div. 691; *Robinson* v. *Massachusetts Mutual Life Insurance Co.* (Sup. Ct. Tenn. Nov. 29, 1941); *Cecil* v. *Gradison* (Ohio Ct. App. 1st Dist. Nov. 17, 1941); and *Pederson* v. *Fitzgerald Construction Co.* (N. Y. App. Div. 3rd Dept. Nov. 12, 1941) it was held the act did not apply to employees who were assisting in the work of another employer, himself "engaged in commerce." It is true that in some of these it would have been something of a strain upon the word, "production," to say that the em-

ployees were "engaged in the production of goods" at all; but it is doubtful that the courts meant to rely upon any such distinction, and it is for this reason that we count them against our view. On the other hand the Third Circuit in *Fleming* v. *Kirschbaum Co.*, 123 Fed. (2d) , agrees with us and indeed in one or two matters went further than we have found it necessary as yet to go. In the district courts *Farr* v. *Smith Detective A. & N. W. Service Inc.*, 38 Fed. Suppl. 105, went off upon the fact that the ancillary services to the employer engaged in interstate commerce were occasional; but *Allen* v. *Moe*, 39 Fed. Suppl. 5, must be counted with *Fleming* v. *Kirschbaum Co.*, though it is not on all fours.# Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling.

Judgment reversed.

APPEAL ON QUESTIONS OF LAW, FROM COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO.

HAMILTON COUNTY, No. 6009.

IN THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO.

James B. Cecil, and Emil Telthester,
Appellants,

v.

Willis D. Gradison, et al., Trustees, etc.,
Appellees.

OPINION.

NOVEMBER 17, 1941.

Mr. Leonard J. Dempsey, for Appellants,
Messrs. Steer, Strauss & Adair, for Appellees.

MATTHEWS, *P. J.*

This is an action by employees to recover under the provisions of the Act of Congress, known as the Fair

Merryfield v. *Hoyt Shoe Corp.*, U. S. D. C. N. H., is to the contrary.

Labor Standards Act (52 Stat., 1060, 29 U. S. C. A. 201, *et seq.*) for overtime, at the rate of one and one-half times the regular contractual rate. The trial court sustained a demurrer to the amended petition on the ground that it did not state a cause of action and the plaintiffs not desiring to plead further, judgment was rendered in favor of the defendants.

The only question presented by this record is whether the court erred in sustaining the defendants' demurrer.

The plaintiffs alleged in the amended petition that the defendants own premises known as 406 Elm Street, Cincinnati, Ohio, which they "maintain, operate, control, manage and direct the Peoples Bank Building" located therein.

It is also alleged that certain of the defendants conducted a banking business in part of said building.

It is also alleged that the defendants employed one of the plaintiffs as a janitor and the other as an engineer, and that each was required to operate the elevators in the building, both freight and passenger, and that "in engaging in and upon his various duties in and about said building and said bank for said defendants, he was caused to handle shipments of all and varied kind and description, such as, packages, cartons, cardboard and wooden cases, heavy and light boxes. Such shipments were constantly transported, forwarded * * * and shipped to persons and corporations in other cities beyond the boundaries of the state of Ohio."

It is also alleged that this activity was in furtherance of his employers' business, and that without it, the packages, etc., moving into and out of the building, into and from the various tenants of the various floors, could not have been transported up or down the elevators, or pass from the control of the shipper or tenant to the person to whom the same was directed.

There is no positive statement that the plaintiffs were engaged in interstate commerce, unless the activity de-

scribed constitutes such commerce. There is an allegation that the plaintiffs were "engaged in an occupation necessary for the production of goods for commerce," which is not equivalent to a statement that they were engaged in production of goods for commerce, particularly in view of the specific description of the nature of plaintiff's activities.

The power conferred upon Congress by the "Commerce Clause" (Const. Art. I, sec. 8) extends not only to the making of the rules to govern all the persons, instrumentalities, and commodities while in the channel of interstate commerce, but also the power to protect the flow of interstate commerce from any and all harmful interference or influence from intrastate acts outside the channel, but so closely and intimately connected with the interstate transaction as to substantially affect it. National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1; U. S. *v.* Darby Lumber Co., 312 U. S. 100.

It is clear from the cases that goods which are produced for interstate commerce may be handled and transported after they are produced, and before they enter the interstate channel, and that those engaged in handling them would not be engaged either in interstate commerce or in producing for interstate commerce.

In construing the Fair Labor Standards Act of 1938, the extent of the powers of Congress over interstate commerce must be taken into account.

Production is not commerce, either interstate or intrastate. Products—the results of production—may be the objects of commerce. Until the article produced enters the channel of interstate commerce or the activity in relation to it approaches that channel so closely as to directly and substantially affect the flow in the interstate channel, the article and the activity in relation to it remain under the exclusive power of the states.

Now when does the interstate transaction begin? That is answered by the case of Coe *v.* Errol, 116 U. S. 517, at 525, where the court said:

> "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, * * *."

And having entered the channel of interstate commerce, the article continues until the end of the interstate journey. In State, *ex rel* Pennsylvania Railroad Co. *v.* Knight, 192 U. S. 21, the court held that cab service maintained by the interstate railroad company to carry passengers to and from its terminus in New York—for which a separate charge was made—was not interstate commerce. At page 28, the court said:

> "If the cab which carries the passenger from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage

also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

"We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, . . ."

See also: Minn. *v.* Blasius, 290 U. S. 1.

Therefore, where these plaintiffs, as employees of the defendants, handled articles for defendants and their tenants, they were performing intra-state acts preceding and following interstate transactions, and were not engaged in interstate commerce.

Now, as already stated the Congress under its power to regulate interstate commerce can protect the interstate transaction from harmful extraneous intrastate activities, and where such activities are commingled with or are so closely and directly associated with the interstate transaction as to constitute a continuous threat to the free and uncorrupted flow, regulation of such activity is an appropriate means of exercising the power to regulate interstate commerce. Production by one engaged in interstate commerce bears that close relationship to the interstate business of the producer which warrants its regulation by Congress in order to protect the interstate business.

A reading of the declaration of policy contained in Section 202 and the definition of terms makes it clear that Congress meant to protect the interstate transaction from sub-standard labor conditions by regulating such conditions in the interstate transaction and those transactions that directly and substantially affect the interstate transaction. Beyond that, Congress could not go.

Accordingly, the language of Section 206, U. S. C. A., that "every employer shall pay to each of his employees *engaged in* commerce or in the production of goods for *commerce* wages at the following rates" and the provision

in Section 207 that "No employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce," must be limited by the declared purpose in Section 202 and the definition of terms in Section 203, in order to confine the act within the constitutional power of Congress.

And when so read and limited it is clear that the Act does not apply to employees of intra-state employers engaged in and actually performing intra-state acts, notwithstanding such intra-state acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related. And that this was the intention of Congress is made clearer by the provisions of Section 213, exempting from the operation of the act "any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intra-state commerce."

We are of opinion that the amended petition does not state a cause of action and that no error was committed in sustaining the demurrer thereto.

For these reasons, the judgment is affirmed.

Filed Nov. 29, 1941.

S. E. CLEAGE,
Clerk

HAMILTON & ROSS, *J. J.*, Concur.

TENNESSEE SUPREME COURT.

Horace Lee Robinson, Plaintiff in Error,

v.

Massachusetts Mutual Life Insurance Company, Defendant in Error.

Decided November 29, 1941.

MCKINNEY, *Justice*:—The question before us is whether plaintiff in error and those for whom he sues are subject

to the provisions of the Fair Labor Standards Act of 1938, Chapter 676, 52 Stat. 1060. The issue was raised by demurrer to the declaration which the trial court sustained and dismissed the suit.

The defendant in error is a corporation with its main office in Massachusetts, but with a local office in Knoxville, Tennessee. It is engaged in writing life insurance and in such other activities as are usually carried on by like organizations, and it may be conceded that in the prosecution of its insurance business it is engaged in interstate commerce. It is averred in the declaration:

"That in furtherance of its business of investing capital received from policyholders as premiums on insurance contracts, the defendant became the owner of and operator of three office buildings situated in the Sixth Ward of the City of Knoxville, a municipal corporation located in Knox County, Tennessee, known as the 'Union Building,' located at 410 Union Street, the 'Daylight Building,' located at 506 Union Street, and the 'New Sprankle Building,' located at 508 Union Street, in which are located business offices for rent, and the money received from this rent is controlled and allocated by the defendant from its main office in Massachusetts, either directly or through its district office in Atlanta, Georgia, and used in the furtherance of its said business.

"That the defendant rents said buildings exclusively or more than 90% of space in said buildings to the Tennessee Valley Authority, which builds and operates dams in the streams of Tennessee, Alabama, North Carolina, and Kentucky, to make said streams navigable for interstate commerce, and to generate electricity and buys electricity generated in states other than the State of Tennessee, amongst them being North Carolina and Alabama, and after the electricity thus generated is comingled together, the same is sold and delivered by transmission lines to business concerns located in Tennessee and in states other than the State of Tennessee."

Defendant in error does not have an office or conduct any of its business in either of these buildings.

The declaration further avers:

"That the plaintiff individually and those for whom he sues as agent and other employees similarly situated, are employed by the defendant as firemen, cleaners and washers, etc., and assigned to keep said building clean and in rentable condition, which are duties necessary to keep said office space in a rentable condition, which is a necessary occupation or activity in the prosecution of the defendant's said business."

It is then alleged that plaintiff in error and those for whom he sues come within the provisions of said statute, and that, as such employees for the past two and one-half years, they are entitled to back wages, liquidated damages, and attorney's fees as provided therein.

The purpose of the Act, as stated by Mr. Justice Stone in The United States of America v. F. W. Darby Lumber Company and Fred W. Darby, 312 U. S. 100, 85 L. ed. 609, "is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with 'Industry Committees' appointed by him."

The Act applies to every employee "who is engaged in commerce or in the production of goods for commerce."

The following definitions appearing in three subsections of Section 3 of the Act are pertinent:

(b) " 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

(i) " 'Employee' includes any individual employed by an employer."

(j) " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Counsel agree that an employee seeking back wages must show that he is engaged in interstate commerce or in the production of goods for interstate commerce. The mere fact that the employer is engaged in interstate commerce or in the production of goods for interstate commerce is not sufficient to bring the employee within the purview of the Act. An employer may be engaged in both interstate and intrastate commerce and some of its employees concerned solely with its intrastate business. This conclusion is supported by the following authorities which are cited in the briefs of counsel: Bagby *et al. v.* Cleveland Wrecking Co., 28 Fed. Supp. 271, 272; Foster *v.* National Biscuit Co., 31 Fed. Supp. 553; Gates *v.* Graham Ice Cream Co., 31 Fed. Supp. 854; Wood *v.* Central Sand & Gravel Co. *et al.*, 33 Fed. Supp. 40, 46; Reck *v.* Zarnocay, S. Ct. Trial Term, New York City, N. Y., NYLJ, June 4, 1941, p. 2509.

We are of opinion that plaintiff in error and those in whose behalf he sues are not engaged in interstate commerce or in the production of goods for commerce. We are wholly unable to relate the work in which plaintiff in error is engaged to the actual movement or flow of goods in interstate commerce. As we interpret the Act,

it is limited to those employees who contribute directly to the production of goods for interstate commerce.

If the defendant in error were conducting its interstate insurance business in those buildings, the result might be different.

The only thing which it can be said that defendant in error produces in the operation of these office buildings is rent in the form of money. While money, in a sense, may be treated as commerce it is not ordinarily so considered, but in the ordinary acceptation of the term it is defined as merely a medium of exchange. Republic Acceptance Corporation *v.* Bennett, 220 Mich. 249, 189 N. W. 901; Boddy *v.* Continental Inv. Co., 18 Ala. App. 65, 88 So. 294.

In Sunshine Mining Co. *v.* Carver, 34 Fed. Supp. 274, 277, it is said:

"The expressions 'produced' and 'goods' in the Act indicate that Congress intended the Act to apply to employees engaged in producing goods which are processed further or changed as to form by other persons before going into Interstate commerce and the employee who produces goods which form an ingredient or part of other goods which go into interstate commerce is 'engaged in the production of goods for interstate commerce.'"

If this is a proper interpretation of the Act, and we think it is, then the Congress did not intend that the words "goods, wares, products, commodities, merchandise, or articles or subjects of commerce" should embrace and include "money."

We are unable to agree that the mere fact that the Tennessee Valley Authority, with offices in these buildings, generated electricity at other places and transmitted current in interstate commerce is sufficient to relate complainant to such commerce. Plaintiff in error and those for whom he sues are one step removed from the class of employees embraced in the Act. In a sense every in-

dividual whose activity in any way touches or affects the lives of those engaged in producing goods for interstate commerce contribute to such production, but we think Congress intended to limit the Act to those who directly contribute to the production of the goods. The line of demarcation has to be drawn somewhere, and that designated in the opinion in Sunshine Mining Co. *v.* Carver, *supra,* seems to us to conform to the legislative intent and harmonizes with the purpose of the Act as hereinabove set forth.

The most recent case to which our attention has been directed, in which this question was considered, is that of Fleming *v.* Arsenal Bldg. Corporation, 38 Fed. Supp. 207, 211-212, from which we quote from the opinion of Judge Woolsey as follows:

"The Fair Labor Standards Act does not, however, as does the National Labor Relations Act, extend the limit of the federal jurisdiction to any act '*affecting* commerce.' Cf. 29 U. S. C. A. §§152 (7), 159(c) and also National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, at pages 2932, 57 S. Ct. 615, 81 Ed. 893, 108 A. L. R. 1352.

"The limits of the federal jurisdiction under the Fair Labor Standards Act is extended only to employees 'engaged in commerce or in the production of goods for commerce.' 29 U. S. C. A. §§203, 206, 207.

"Thus the connection of the employees who come under the Fair Labor Standards Act must be direct with commerce, as defined in that act. This involves an obviously narrower concept than the words '*affecting* commerce' used in the National Labor Relations Act which was cited as an analogy by the Government Counsel during the argument of this cause.

"Furthermore, the legislative history of the Fair Labor Standards Act shows clearly, I think, that as a result of the Conference between the Committees of the two Houses of Congress, the words '*production of goods for commerce*'

were substituted for the words '*affecting commerce*' which had been contained in the successive drafts of the statute during its embryonic stages. Cf. 75th Congress, 1st Session, Report No. 884, of July 6, 1937, by Senator Black, of the Senate Committee on Education and Labor; 75th Congress, 1st Session, Report No. 1452, of August 6, 1937, by Mrs. Norton, of the House Committee on Labor; 75th Congress, 3rd Session, Report No. 2182 (at page 2), of April 21, 1938, by Mrs. Norton, of the House Committee on Labor; 75th Congress, 3rd Session, Report No. 2738, of June 11, 1938, being the Conference Report made by Mrs. Norton, of the House Committee on Labor; see, also, 'The coverage of the Fair Labor Standards Act and other Problems in its Interpretation,' to be found in '*Law and Contemporary Problems; The Wage and Hour Law*'—published by the School of Law of Duke University, in the summer of 1939, Volume 6, No. 3, pages 334-352, especially pages 338-339.

"This indicates quite graphically that when the Fair Labor Standards Act of 1938 was passed the intent of Congress was that its ambit should be narrower than the ambit of the National Labor Relations Act, and consequently, it seems perfectly clear to me, that the employees of the defendants are not to be considered as included within the Fair Labor Standards Act of 1938.

"The acts of these employees might '*affect* commerce,' but I find that they did not function in the '*production of goods for commerce*' even under the broad definition of 'produce' given by the statute and quoted above.

"I find, therefore, that the employees of the defendants were not working in manufacturing establishments producing goods for commerce."

The facts of that case, as set forth in the seventh syllabus, are as follows:

"Where sole business of building owner was limited to the leasing of space in its building to tenants, the maintenance of its building in good order and condition

and rendering to its tenants, many of whom were engaged in manufacture of goods for interstate commerce, the ordinary type of service customary in the operation of office building, the owner was not a 'manufacturing establishment' engaged in the 'production of goods for commerce,' and therefore its employees were not entitled to protection of the Fair Labor Standards Act."

Under similar facts the Supreme Court of New York in Killingbeck *et al. v.* Garment Center Capital, Inc., 20 N. Y. Supp. (2nd) 521, held that the employees were not protected by the Fair Labor Standards Act.

A contrary view to that expressed in the two foregoing cases was declared by Judge Kirkpatrick in Fleming *v.* A. B. Kirschbaum Co., 38 Fed. Supp. 204, but the decision in that case, if carried to its logical conclusion, would embrace every employee who in the remotest degree contributed to those who produced goods for interstate transportation, which, as heretofore stated, was not, in our opinion, the purpose of Congress.

For the reasons set forth herein, we feel constrained to overrule the assignments of error and affirm the judgment of the trial court.